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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

COUNTY OF FRESNO, Plaintiff and Appellant, v. COLIN KOOYUMJIAN, Defendant and Respondent.	F049230 (Super. Ct. No. 03CECG00259) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Alan M. Simpson, Judge.

Dennis A. Marshall, County Counsel, and David F. Rodriguez, Deputy County Counsel, for Plaintiff and Appellant.

No appearance for Defendant and Respondent.

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STATEMENT OF THE CASE

On March 11, 2003, appellant County of Fresno (County) filed a first amended complaint in the Fresno County Superior Court naming respondent Colin Kooyumjian (Kooyumjian) as defendant and setting forth 10 causes of action as follows:

First through Eighth Causes of Action—False Claims Act (Gov. Code, § 12651);

Ninth Cause of Action—intentional interference with prospective economic advantage; and

Tenth Cause of Action—money had and received and declaratory relief.

The County prayed for compensatory, treble, and punitive damages, civil penalties, interest on the foregoing sums, declaratory relief, and attorney fees as permitted by law.

On July 1, 2003, Kooyumjian filed a first amended answer generally denying the material allegations of numerous paragraphs of the first amended complaint and setting forth numerous affirmative defenses.

On June 20, 2005, County moved in limine to bifurcate trial of the issue of Kooyumjian's liability.

On August 2, 2005, after several continuances, trial commenced before the Honorable Alan Simpson, judge of the superior court, sitting without a jury.

On August 4, 2005, the third day of trial, County rested its case and the court granted Kooyumjian's oral motion for nonsuit (Code Civ. Proc., § 581c). On the same date, the superior court ordered the record sealed because trial exhibits contained confidential data.

On September 20, 2005, the court filed a formal judgment in favor of Kooyumjian.[1]

On November 10, 2005, County filed a timely notice of appeal.

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[1] In this judgment, the court noted: "At the close of Plaintiff's case, the Court granted Defendant Kooyumjian's oral motion for non-suit." The 1961 enactment of Code of Civil Procedure section 631.8 abolished the motion for nonsuit in nonjury civil trials and replaced it with the motion for judgment. In such circumstances, a reviewing court may treat the motion made as a motion for judgment. (*Milton Meyer & Co. v. Curro* (1966) 239 Cal.App.2d 480, 482.) A judgment under section 631.8 is an appealable order. (Code Civ. Proc., § 904.1, subd. (a); see *Greening v. General Air-Conditioning Corp.* (1965) 233 Cal.App.2d 545, 550.)

On November 30, 2005, the superior court filed an order clarifying its order of August 4, 2005. The superior court stated: "The file is not to be sealed and only the exhibits are to remain sealed."

STATEMENT OF FACTS

On December 3, 1996, County entered into an "Indigent Conflict Defense Services Agreement" (Barker Agreement) with John A. Barker & Associates (Barker) for a three-year term beginning on January 1, 1997. Under the Barker Agreement, Barker contracted to provide up to seven levels of conflict public defender services to County. Upon a conflict declared by the Fresno County Public Defender, the seven levels of conflict services would be implemented under the Barker Agreement. To that end, the agreement designated Barker as the first alternate defense attorney, the Alternate Defense Office (ADO) as the second alternate defense attorney, and up to five independent attorneys as the third through eighth alternate defense attorneys. According to John W. Weiser, a principal administrative analyst for the County, December 31, 1999, was the original ending date of the agreement and there were 2 one-year extensions. Pursuant to the Barker Agreement, the County agreed to pay Barker on a monthly payment schedule for the contracted services.

Barker hired Kooyumjian as one of five independent attorneys—nicknamed "wheel attorneys"—under a separate "Independent Contractor Agreement for Public Defender Services" (Kooyumjian Agreement) dated January 1, 1997. Pursuant to the Kooyumjian Agreement, Barker assigned Kooyumjian to represent criminal defendant Nua Moua in the following superior court cases:

Phase One	Case No. 613600-6
Phase Two	Case No. 622344-0
Phase Three	Case No. 640217-6

A Barker & Associates internal memorandum referred to these and related matters as "Hmong 'Gang Rape' Cases."[2]

The Kooyumjian Agreement provided for a three-year term commencing January 1, 1997 and terminating on December 31, 1999, subject to termination by either party upon giving 30 days written notice to the other party. As to contractual duties and compensation, the Kooyumjian Agreement provided in pertinent part:

> "1. CONTRACTOR [Kooyumjian] shall perform all duties of a public defender as required by law for all cases assigned by BARKER & ASSOCIATES to CONTRACTOR in the Superior/Municipal Courts, Juvenile Court and outlying courts in the County of Fresno.
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> "2. For services provided under this Agreement, BARKER & ASSOCIATES shall pay CONTRACTOR the annual sum of Thirty Thousand Dollars ($30,000.00). Said amount shall be paid in equal semi-monthly payments with payment periods ending on the fourteenth (14th) and last day of each month...."

From January 15, 1998 through June 30, 2000, Barker paid Kooyumjian for services rendered on his various assigned cases, including the three phases/cases involving Nua Moua. The Kooyumjian Agreement with Barker was terminated on June 30, 2000.

On March 19, 1999, Kooyumjian wrote the Honorable James Quaschnick, judge of the superior court, stating:

> "This letter is with reference to my current appointment on the above-case. I discussed this matter with Linda Reed, and was advised that the appropriate manner of making the following request is by this letter.
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> "As the court knows, I am one of four attorneys on the 'wheel' for appointments on adult and juvenile cases in Fresno County. I was appointed to represent Nua Moua in the previous case before the Honorable

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[2] Although the record on appeal does not contain superior court orders formally appointing Kooyumjian as trial counsel, the record does contain minute orders reflecting his name as defense counsel for Nua Moua.

> Lawrence O'Neill [case no. 613600-6.] I estimate that I spent approximately 250 to 300 hours before the resolution of that case.
>
> "I am currently appointed to represent the same defendant in front of the Honorable Gene Gomes. I am informed and believe that the court will be making a finding that the instant case is complex. Based on my review of the current discovery, conversations with the Government, and experience, I estimate this case to take double the amount of time I worked on the last case. The defendant already has a 31-year prison commitment in that previous case, and due to my familiarity with this defendant, the likelihood that the instant case will go to trial is greatly increased.
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> "I am now the only wheel attorney on this case. I am respectfully requesting that the court appoint me outside of my current contract due to the complexity of the case, the time involved in dealing with the case, and the fact that I have previously represented this defendant."

On March 25, 1999, Kooyumjian wrote a memorandum to his Nua Moua case file, stating in relevant part:

> "On March 25, 1999, I received a phone call from Linda Reed of the Superior Court. Mrs. Reed advised that based upon my letter, Commissioner Weinberg had approved me to be appointed outside of my ADO contract at the rate of $40.00 an hour on the above-case. Mrs. Reed also advised that the court could send verification of this, however, it was not necessary."

On March 31, 1999, John A. Barker wrote a memorandum to James Brashear, chief defense attorney of the ADO, stating: "Effective April 5, 1999, Marcus Olmos will be available as a subcontractor to fill in during the period that Mr. Kooyumjian and Mr. [Eric] Green are in trial, which is estimated to be 2-1/2 months."

On August 25, 1999, Kooyumjian submitted an application for payment of $3,732 in attorney fees in case No. 622344-0 for the period March 29 through August 24, 1999.[3]

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[3] Principal Analyst John Weiser testified a typical application for payment consisted of (1) a cover page from the superior court bearing the signature of Court Executive Officer Tamara Beard and some account information; (2) pages from the defense counsel detailing the date of services, hours spent, activity, expenses, and total spent; and (3) a

The first paragraph of the printed application form stated: "I have not received compensation in this matter …." The foot of the face page of the application form included a declaration under penalty of perjury just above the signature line. Kooyumjian completed the declaration and signed the application form. A judge of the superior court signed the order on application on September 2, 1999. The County paid the ordered sum by check issued on September 23, 1999.[4]

On November 12, 1999, Kooyumjian submitted a second application for payment of fees in case No. 622344-0 and the consolidated case No. 640217-6. The application was initially in the sum of $3,056 for legal services rendered between August 28 and November 11, 1999. James S. Quaschnick, judge of the superior court, corrected the claimed amount to read "$3612.00" and signed the corrected application on November 23, 1999. The County paid the ordered sum by check issued on December 21, 1999.

On February 9, 2000, Kooyumjian wrote to John A. Barker in Madera, California, stating in relevant part:

> "As we have discussed, I am in a long cause trial in the case of People v. Nua Moua, et al. I handled this case on the wheel for over one year, and I am now court appointed. The trial is expected to last until May or so, however, it could end sooner.
>
> "After our conversation during the week of January 24, 2000, I have hired Chuck Magill to handle my appearances during the trial of People v. Nua Moua. We have numerous dark days during the trial, including all Fridays, and I expect to be able to make most of my contract appearances, with Mr.

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two-page application and order for payment of attorney fees prepared by the defense attorney and signed by a judge of the superior court.

[4] According to Mr. Weiser, "the Court would send documents to us with attached detail for us to review, and then we would sign off on that and send it to our auditor/controller who would issue the check." He further explained that court staff members would prepare the package of financial information, enter it into a shared accounting system, and then submit the package to the County Administrative Office for further processing.

> Magill making those appearances which I cannot make for one reason or another. [¶] ... [¶]
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> "On February 9, 2000, Paul Fairless of Barker & Associates, had a conversation with Chuck Magill wherein he told Chuck that I was not making appearances in Juvenile Court, and that I was somehow in breach of my contract with you. Mr. Fairless further told Mr. Magill that I never try cases for your organization. I confronted Mr. Fairless in front of Mr. Magill regarding his comments, wherein he retracted most of those comments. As you know, Mr. Barker, I have tried numerous cases for your organization, including the Melody Park case which lasted approximately three months. I do not appreciate Mr. Fairless making unfounded comments to my associates or others regarding the number of cases I have tried for Barker & Associates, and particularly about contracts with the Barker organization."

On February 13, 2000, Kooyumjian submitted a third application for payment of fees in case No. 622344-0 and the consolidated case No. 640217-6. The application was initially in the sum of $9,044 for legal services rendered between November 13, 1999 and February 11, 2000. Gene M. Gomes, judge of the superior court, corrected the claimed amount to read "$8,804.00" and signed the corrected application on February 16, 2000. The County paid the ordered sum by check issued on February 18, 2000.

On April 2, 2000, Kooyumjian submitted a fourth application for payment of fees in case No. 622344-0 and the consolidated case No. 640217-6. The application was in the sum of $11,360 for legal services rendered between February 12, 2000 and April 2, 2000. Gene M. Gomes, judge of the superior court, signed the application on April 10, 2000. The County paid the ordered sum by check issued on April 25, 2000.

Sometime between April and May 2000, the Administrative Office of the County (CAO) stopped processing the orders upon Kooyumjian's application for fees after discovering that appellant had been assigned case Nos. 622344-0 and 640217-6 (phases II and III) under Kooyumjian's agreement with Barker. The CAO requested the court issue an order appointing Kooyumjian as counsel for Moua outside of Kooyumjian's

agreement with Barker. However, the court apparently did not issue an order at that time.[5]

On May 8, 2000, Kooyumjian submitted a fifth application for payment of fees in case No. 622344-0 and the consolidated case No. 640217-6. The application was in the sum of $12,512.59 for legal services rendered between April 3, 2000 and May 4, 2000. Gene M. Gomes, judge of the superior court, corrected the claimed amount of attorney fees to read "$10,080.00" and the total amount to "$12,392.59," and signed the application on May 16, 2000. Analyst Weiser said the CAO did not process the payment pending some questions. These questions arose after Weiser had an informal conversation with attorney Jonathan Richter in Courthouse Park. The County delayed payment for about one month and ultimately paid the ordered sum by check issued on July 6, 2000.[6] Weiser said he was unaware of any other attorney in the gang rape case who "started the case as a wheel [attorney] and then subsequently went to a Court-appointed $40 an hour."

On May 26, 2000, John A. Barker wrote a letter to Kooyumjian stating in relevant part:

> "Over the past six to twelve months, certain complaints have been brought to my attention concerning your court appearances. For instance, I have a Municipal Court Judge who does not want to appoint you and Judge Caeton, in Dependency Court, has consistently complained about your appearances. I of course realize you have been tied up in the Hmong case

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5 On April 18, 2000, during that same period of time, Kooyumjian filed an ex parte motion for additional funding for court appointed investigator to assist in the preparation of the defense.

6 On May 12, 2000, the court filed an order for payment of $2,313.59 in ancillary travel costs pursuant to Kooyumjian's written request filed the same date. In that written request, Kooyumjian noted "the court previously signed an order on or about April 14, 2000, based on this declaration, and ... such order for payment of ancillary travel costs has been lost."

and I have tried to cut some slack in that regard, but it has gotten to the point I can no longer ignore the situation. Therefore, I am exercising the 30-day notice clause in the contract. The contract will terminate on June 30, 2000."

On June 28, 2000, Kooyumjian filed a declaration of counsel, stating in relevant part:

"2. That I have represented defendant Nua Moua throughout the trial proceedings in Department 11 of the Fresno County Superior Court, beginning January 20, 2000, and still proceeding through this date, June 27, 2000;

"3. That on or about March 19, 1999, I submitted a letter to Presiding Judge Quaschnick, with copies sent to Judge Gene Gomes and Executive Officer Tamara Beard, indicating that I was requesting appointment outside of my Barker subcontract [See EXHIBIT A, letter];

"4. That on March 25, 1999, I spoke with Linda Reed wherein she advised me that my request for appointment had been approved by the court, payable at the rate of $40.00 an hour, and that verification of this appointment from the court was not necessary [See EXHIBIT B, memo];

"5. That during the month of June 2000, it has come to my attention that the County of Fresno requests an order for my appointment on the case. That Judge Gomes suggested to me that I get a Nunc Pro Tunc Order for appointment from Judge Quaschnick, who was presiding judge during the 1999 term;

"6. That on June 26, 2000, I reviewed the entire court file, but for confidential filings, and did not find any order appointing me to the case;

"7. That interim billing is ordered in defendant Nua Moua's case, and that the court has approved all billings submitted by my office to date, and the County of Fresno has paid previous interim billings submitted by this office."

On the same date, Judge Quaschnick filed an order for appointment of Kooyumjian nunc pro tunc, stating:

"IT IS HEREBY ORDERED THAT Attorney COLIN J. KOOYUMJIAN be appointed Nunc Pro Tunc to represent said defendant NUA MOUA , in the above-referenced case [No. 622344-0]. That said appointment is

> effective March 25, 1999, payable at the rate of $40.00 hour for legal services and $240.00 a day for trial."

Analyst Weiser testified his office did not normally receive such orders and the first time he saw the order of Judge Quaschnick "was through our County attorney."

On July 6, 2000, Kooyumjian submitted a sixth application for payment of fees in case No. 622344-0 and the consolidated case No. 640217-6. The application was in the sum of $9,896 for legal services rendered between May 5, 2000 and June 22, 2000. Gene M. Gomes, judge of the superior court, corrected the claimed amount of attorney fees to read "$9,912.00," and signed the application on July 31, 2000. The County paid the ordered sum by check issued on August 22, 2000.

On August 2, 2000, Judge Gomes filed an order for legal fees nunc pro tunc that provided generally:

> "IT IS HEREBY ORDERED THAT attorneys appointed by the Fresno County Courts to represent the indegent [*sic*] defendants in this action, shall be paid 3.0 hours per day at the rate of $40 per hour, for court-ordered on-call services, each day the jury is in deliberation and for the duration, until a verdict is reached. This order is nunc pro tunc effective June 6, 2000."

On November 7, 2000, Kooyumjian submitted a seventh application for payment of fees in case No. 622344-0. The application was in the sum of $6,792 for legal services rendered between June 23, 2000 and November 5, 2000. Judge Gomes approved the claimed amount and signed the application on November 13, 2000. The County paid the ordered sum by check issued on November 30, 2000.

On January 9, 2001, Kooyumjian submitted an eighth application for payment of fees in case No. 622344-0 and consolidated case No. 640217-6. The application was in the sum of $2,288 for legal services rendered between November 7, 2000 and January 9, 2001. Judge Gomes approved the claimed amount and signed the application on January 9, 2001. The County paid the ordered sum by check issued on January 30, 2001.

Between January 15, 1998 and June 30, 2000, Barker & Associates issued checks to Kooyumjian in the total sum of $83,114.28. At the August 2, 2005 hearing, Donnie

Maxwell testified he was the operations manager for all eight offices of John A. Barker & Associates, a professional law corporation. Maxwell said his responsibilities included administration, payroll, supplies, and general services for the corporation. Although Maxwell never personally hired anyone, he understood the Kooyumjian Agreement to be a part-time contract, that Kooyumjian was an independent contractor under the agreement, and that Kooyumjian was free to have other cases. Maxwell explained, "[T]he contracting attorney ... also can take private cases, as long as it is not a case that would cause a conflict of interest that would prevent them from taking the public defender case." Maxwell said he had no records showing that Kooyumjian returned any of the payments Barker & Associates made to him between January 15, 1998 and June 30, 2000.

Charles J. Farley, the chief accountant for the general accounting division of the Fresno County Auditor/Controller's Office, prepared a summary of all payments made to Kooyumjian in the Nua Moua case. Farley's summary reflected the following information:

Payment Date	**Payment Amount**
September 23, 1999	$3,732.00
December 21, 1999	$3,612.00
February 18, 2000	$8,804.00
April 25, 2000	$11,360.00
July 6, 2000	$12,392.59
August 22, 2000	$9,912.00
November 30, 2000	$6,792.00
January 30, 2001	$2,288.00

At the conclusion of plaintiff's case, Kooyumjian orally moved for a nonsuit. After extensive arguments by and exchanges with counsel, the court granted the motion, stating in relevant part:

> "[I]n the declaration that Mr. Kooyumjian prepared and submitted, in support of his seeking a nunc pro tunc order, he references ... by virtue of

his March 19, 1999 letter, he was requesting appointment outside of his Barker subcontract. And that's Exhibit A to his declaration ....

"And ... in that exhibit he says, 'As the Court knows, I'm one of the four attorneys on the wheel for appointments on adult and juvenile cases. I was appointed to represent Nua Moua in the previous case before Judge O'Neill.' And he gives the case number. 'I estimate that I spent approximately 250 to 300 hours before resolution of that case. I'm currently appointed to represent the same defendant in front of the Honorable Gene Gomes.'

"And then it goes on .... 'I am now the only wheel attorney on this case. I am respectfully requesting that the Court appoint me outside of my current contract due to the complexity of the case, time involved, and the fact I previously represented this defendant.'

"Presumably ... Mr. Kooyumjian probably did send this letter, this March 19, 1999 letter, to Judge Quaschnick. He probably did. And that this letter of March 19 clearly says everything that you're saying. He was right up-front about it to the Court ....

"Having told the Court that he ... had been representing this defendant subject to the contract with Barker .... He tells the Court that right up-front. Presumably, the Court read this. … [H]e sends that [letter] to Judge Quaschnick. And later, he attaches that same letter as Exhibit A to a Declaration that we know was filed with the Court in June of 2000 seeking to obtain a nunc pro tunc order from Judge Quaschnick.

"He attaches that same letter saying those same things. Presumably Judge Quaschnick read the Declaration of Counsel Re Nunc Pro Tunc Order and the attachment to it – that March 19 letter – before he signed the nunc pro tunc order. I have to assume that.

"And there it is right there. That's exactly what you're saying. Mr. Kooyumjian represented that to the Court. 'I've been representing this defendant for over a year pursuant to this contract with the wheel. I want you to help me out. I want you to create a situation where I am being paid by the County outside of this arrangement that I presently have. I need a nunc pro tunc order to do that.'

"Presumably, the Judge read all of this – some of it maybe twice at different times, i.e., the March 19 letter … declaration filed June 28, 2000 and then signed the June 26, 2000 order for Appointment of Counsel Nunc Pro Tunc.

"... I have to assume that the Court was apprised of those facts by virtue of these documents, the exact ones you're saying. They had to have known. And so the question goes back around to a couple of things. One is: Can the Court do that by way of a nunc pro tunc order? That is one of the things you're asking me to determine.

"And, secondly, does that impair the obligation of a contract between Mr. Kooyumjian and Barker & Associates? And essentially, when you look at the facts, it doesn't, nor was it fraudulent. He's advised everyone of it right up-front.

"And I understand your position, —and I could be wrong – but under the circumstances, it appears to me that he was authorized by the Court to receive the money that he did. And to the extent that he got paid double, or whatever you want to call it, I don't think there's anything I can do about that. I don't think it would be appropriate, equitable, legal, or anything else to tell him, 'You've got to pay the County back this $52,000 that they paid you,' when he said right up-front to everybody, 'This is my situation, and I want to change it to this – other arrangement.' And everyone said, 'Okay,' or at least no one said, 'No,' until 2003 when this lawsuit was filed against him. [¶] ... [¶]

"... Mr. Rodriguez [deputy county counsel] ... has a position – and I certainly understand it. It's just that I think, when you take all of the evidence into consideration and you consider the fact that the Court approved this ... I am not going to sit here now and undo what the Court did, apparently being clearly advised of the facts, and tell you that you've got to pay 50-some-odd thousand dollars back when the Court approved this, and you've disclosed, as far as I can tell, to everyone all the way along what you were trying to do. [¶] One can argue with whether that was appropriate or whether you should have told more people or whether what was in your mind was something that was being contemplated by everyone else. [¶] ... [¶]

"It's here on paper. So I can't sit here now, in the face of the evidence and this record, and undo what the Court has already done. I don't think that's fair. I don't think it's equitable. [¶] I can understand why in hindsight, even looking back at it from the time when the lawsuit was filed or the time when the County Counsel's office met with ... the Board of Supervisors ... even considering all of that ... I don't see where you have misled anyone, and so I'm going to grant the motion."

DISCUSSION

County contends the superior court committed procedural error by granting nonsuit following the presentation of appellant's case-in-chief.

Code of Civil Procedure section 581c states in relevant part:

> "(a) Only after, and not before, the plaintiff has completed his or her opening statement, or after the presentation of his or her evidence in a trial by jury, the defendant, without waiving his or her right to offer evidence in the event the motion is not granted, may move for a judgment of nonsuit.
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> "(b) If it appears that the evidence presented, or to be presented, supports the granting of the motion as to some but not all of the issues involved in the action, the court shall grant the motion as to those issues and the action shall proceed as to the issues remaining. Despite the granting of the motion, no final judgment shall be entered prior to the termination of the action, but the final judgment in the action shall, in addition to any matters determined in the trial, award judgment as determined by the motion herein provided for.
>
> "(c) If the motion is granted, unless the court in its order for judgment otherwise specifies, the judgment of nonsuit operates as an adjudication upon the merits."

Code of Civil Procedure section 631.8 states in relevant part:

> "(a) After a party has completed his presentation of evidence in a trial by the court, the other party, without waiving his right to offer evidence in support of his defense or in rebuttal in the event the motion is not granted, may move for a judgment. The court as trier of the facts shall weigh the evidence and may render a judgment in favor of the moving party, in which case the court shall make a statement of decision as provided in Sections 632 and 634, or may decline to render any judgment until the close of all the evidence. The court may consider all evidence received, provided, however, that the party against whom the motion for judgment has been made shall have had an opportunity to present additional evidence to rebut evidence received during the presentation of evidence deemed by the presenting party to have been adverse to him, and to rehabilitate the testimony of a witness whose credibility has been attacked by the moving party. Such motion may also be made and granted as to any cross-complaint.

"(b) If it appears that the evidence presented supports the granting of the motion as to some but not all the issues involved in the action, the court shall grant the motion as to those issues and the action shall proceed as to the issues remaining. Despite the granting of such a motion, no final judgment shall be entered prior to the termination of the action, but the final judgment in such action shall, in addition to any matters determined in the trial, award judgment as determined by the motion herein provided for.

"(c) If the motion is granted, unless the court in its order for judgment otherwise specifies, such judgment operates as an adjudication upon the merits."

County contends on appeal:

"In a trial by court, motion for nonsuit is not recognized. *Ford v. Miller Meat Co.* (1994) 46 Cal.App.4th 1196, 1200. Therefore, the Trial Court erred procedurally in granting Respondent's motion for nonsuit after the presentation of Appellant's evidence in this court trial.... [¶] ... [¶]

"Procedurally, in a court trial upon presentation of plaintiff's evidence, the proper motion is a motion for judgment, pursuant to CCP § 631.8(a), which provides for a written statement of decision where the trial is not concluded within one calendar day, pursuant to CCP § 632. ... Although not stated on nor supported in the record, if this Court finds that the Trial Court treated Respondent's motion as a 'motion for judgment,' pursuant to CCP § 631.8(a), rather than as stated a motion for 'nonsuit directed verdict,' the standard for review on a grant of motion for judgment is whether the trial court's findings are supported by substantial evidence. *Jordan v. City of Santa Barbara* (1996) 46 Cal.App.4th 1245, 12[55] ....[7]

As County correctly points out, in a trial by the court, a motion for nonsuit is not recognized. The correct motion is for judgment pursuant to Code of Civil Procedure section 631.8. The purpose of the latter statute is to enable the court, after weighing the evidence at the close of the plaintiff's case, to find the plaintiff has failed to sustain the burden of proof, without the need for the defendant to produce evidence. In weighing the evidence, the trial judge may exercise the prerogatives of a fact trier by refusing to believe witnesses and by drawing conclusions at odds with expert opinion. If the motion

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[7] Respondent has not filed a respondent's brief or other appearance in this appeal.

is granted, his or her findings are entitled to the same respect on appeal as any other findings and are not reversible if supported by substantial evidence. (*Ford v. Miller Meat Co.* (1994) 28 Cal.App.4th 1196, 1200.)

Code of Civil Procedure section 631.8 serves the same purpose as does section 581c, which permits the court to grant a nonsuit in a jury trial. Nevertheless, a section 631.8 motion and a motion for nonsuit evoke different procedures. Any error involving section 631.8 must result in a miscarriage of justice before a reversal will be ordered. (*National Farm Workers Service Center, Inc. v. M. Caratan, Inc.* (1983) 146 Cal.App.3d 796, 807.) On appeal, we view the evidence in the light most favorable to the judgment under section 631.8 and are bound by the trial court's findings that are supported by substantial evidence. However, we are not bound by a trial court's interpretation of the law and independently review the application of the law to undisputed facts. (*People ex rel. Dept. of Motor Vehicles v. Cars 4 Causes* (2006) 139 Cal.App.4th 1006, 1012.)

County submits the distinction between a nonsuit and motion for judgment is substantial upon appeal. Generally speaking, Code of Civil Procedure section 631.8 (motion for judgment) serves the same purpose as section 581c (nonsuit). However, unlike a motion for nonsuit, which may be brought only by the defendant, a section 631.8 motion may be brought by either party. Generally, it is the defendant who brings the motion. (*Roth v. Parker* (1997) 57 Cal.App.4th 542, 549.)

In a jury trial, a motion for nonsuit challenges the sufficiency of the plaintiff's evidence. A nonsuit may be granted only when disregarding conflicting evidence, giving to the plaintiff's evidence all the value to which it is legally entitled, and indulging every legitimate inference which may be drawn from the evidence in plaintiff's favor, it can be said there is no evidence to support a jury verdict in his or her favor. A motion for nonsuit must be denied if there is any substantial evidence that, with the aid of all legitimate inferences favorable to the plaintiff, tends to support a plaintiff's verdict. (*Elmore v. American Motors Corp.* (1969) 70 Cal.2d 578, 583; *Golceff v. Sugarman*

(1950) 36 Cal.2d 152, 152-153.) In sum, the court must accept as true the evidence most favorable to the plaintiff and disregard any conflicting evidence. (*Nemarnik v. Los Angeles Kings Hockey Club* (2002) 103 Cal.App.4th 631, 635.)

Upon a motion for judgment in a court trial, in contrast, the judge shall weigh the evidence. The judge may exercise the prerogatives of a fact trier by refusing to believe witnesses. The judge may also draw conclusions at odds with expert opinion testimony. (*Roth v. Parker, supra,* 57 Cal.App.4th at pp. 549-551.) Conflicts in the evidence, conflicting interpretations thereof, conflicting inferences which reasonably may be drawn therefrom, or the refusal to draw inferences, are within the court's power under a Code of Civil Procedure section 631.8 motion for judgment. (*Roland v. Hubenka* (1970) 12 Cal.App.3d 215, 220.) Further, in the event the trial court renders a judgment in favor of the moving party, the court "shall make a statement of decision as provided in Sections 632 and 634 ...." (§ 631.8, subd. (a).)

Under Code of Civil Procedure section 632, the court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial. The request must be made within 10 days after the court announces a tentative decision, unless the trial is concluded within one calendar day or in less than eight hours over more than one day. In such event, the request must be made prior to submission of the matter for decision. The request for a statement of decision shall specify those controverted issues as to which the party is requesting a statement of decision. (§ 632.)

The Legislature, by enactment of Code of Civil Procedure section 632, and the Judicial Council, by its adoption of California Rules of Court, rule 232, have created a comprehensive method for informing the parties and ultimately the appellate courts of the factual and legal basis for the trial court's decision. A statement of decision prepared in conformity with the established procedure may be vitally important to the litigants in framing the issues, if any that need to be considered or reviewed on appeal.

Parenthetically, such a statement may render obvious the futility of an appeal. Eventually, a careful issue identification and delineation may also be of considerable assistance to the appellate court. Another equally important aspect of the orderly procedure ordained for eliciting and originating a statement of decision is the parties' opportunity to make proposals as to its content. (*In re Marriage of S.* (1985) 171 Cal.App.3d 738, 747-478; *Whittington v. McKinney* (1991) 234 Cal.App.3d 123, 126-127.)

Code of Civil Procedure section 632 clearly specifies that the issuance of a statement of decision upon timely request is mandatory and the trial court's failure to prepare one upon timely request is reversible per se. (*In re Marriage of S., supra,* 171 Cal.App.3d at p. 748.) County made no request for a statement of decision in the instant case. However, unlike the typical situation, the omission was not attributable to the neglect, inadvertence, or undue delay of the nonprevailing party. Rather, Kooyumjian expressly moved for "nonsuit" at the conclusion of County's case and the court considered, ruled upon, and formally adjudicated the motion in the context of that procedural device rather than in the context of a motion for judgment. Generally speaking, a trial court need not issue a statement of decision after a ruling on a motion. (*Mechanical Contractors Assn. v. Greater Bay Area Assn.* (1998) 66 Cal.App.4th 672, 678.) The statute governing nonsuits does not expressly authorize a statement of decision upon the grant of a nonsuit. In contrast, the statute governing motions for judgment expressly authorizes for "a statement of decision as provided in Sections 632 and 634." (§ 631.8, subd. (a).)

A statement of decision is the touchstone in determining whether or not the trial court's decision is supported by the facts and law. (*Slavin v. Borinstein* (1994) 25 Cal.App.4th 713, 718.) A statement of decision is not required unless timely requested by a party. (*Tusher v. Gabrielsen* (1998) 68 Cal.App.4th 131, 140, fn. 10.) Where the parties do not request a timely statement of decision, all intendments favor the ruling of

the trial court and an appellate court must assume the trial court made whatever findings are necessary to sustain the judgment. (*Michael U. v. Jamie B.* (1985) 39 Cal.3d 787, 792-793.) Expressed another way, a statement of decision enables a reviewing court to determine what law the trial court employed. A failure to request a statement of decision results in a waiver of such findings and a party cannot be heard to complain on appeal. (*In re Marriage of Ditto* (1988) 206 Cal.App.3d 643, 647.)

In the instant case, the trial judge spoke at length and in substantial detail as to the reasons for granting Kooyumjian's motion for "nonsuit." However, that oral recitation was not the equivalent of a written statement of decision and did not afford County the attendant procedural protections of a statement of decision, such as the opportunity to (a) specify controverted issues; (b) make proposals as to the content of the statement of decision; and (c) object to the content of a proposed statement of decision. (Code Civ. Proc., § 632; Cal. Rules of Court, rule 232(b)-(d); *Whittington v. McKinney, supra,* 234 Cal.App.3d at p. 129.) Had Kooyumjian and the court framed the motion and ruling as being under section 631.8, then County clearly could have borne the responsibility to timely request a statement of decision. (*Tusher v. Gabrielsen, supra,* 68 Cal.App.4th at p. 140, fn. 10.) However, the misdesignation of the motion failed to put County on notice of its right to request such a statement upon timely compliance with Code of Civil Procedure sections 631.8, 632 and 634.

In view of the above, the judgment of nonsuit must be reversed and the matter remanded to the trial court with instructions to permit the County to request "a statement of decision as provided in Sections 632 and 634." (Code Civ. Proc., § 631.8.) Upon a timely request and specification of issues by County, the trial court shall provide an explanation of the factual and legal basis for the court's decision regarding the principal

controverted issues at trial.[8] (*Hellman v. La Cumbre Golf & Country Club* (1992) 6 Cal.App.4th 1224, 1230.) This will give the trial court an opportunity to place upon the record, in definite written form, its view of the facts and the law of the case, and to make the case easily reviewable on appeal by exhibiting the exact grounds upon which the judgment rests. (*R.E. Folcka Construction, Inc. v. Medallion Home Loan Co.* (1987) 191 Cal.App.3d 50, 52-53.)

DIPOSITION

The judgment of nonsuit is reversed. The matter is remanded to the trial court with instructions to (a) rule on the motion as a motion pursuant to Code of Civil Procedure section 631.8 (motion for judgment); (b) if the court rules in favor of moving party (Kooyumjian), it shall permit either party to file a request for a statement of decision as provided in Code of Civil Procedure sections 632 and 634; (c) if the motion is granted, enter judgment pursuant to the provisions of Code of Civil Procedure section 631.8; and (d) if the motion is denied, proceed accordingly.

Each party to bear their own costs on appeal.

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HARRIS, Acting P.J.

WE CONCUR:

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WISEMAN, J.

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CORNELL, J.

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[8] In the instant appeal, County further contends (a) Kooyumjian's agreement with Barker did not permit him to seek compensation outside of the agreement on a Barker-appointed case; (b) County, as a third-party beneficiary, is entitled to enforce the Kooyumjian Agreement with Barker to provide public defender services; and (c) appointment of counsel pursuant to Penal Code section 987.2 cannot impinge upon the obligations of the Kooyumjian Agreement with Barker. Upon remand, County may appropriately specify these controverted issues in its request for statement of decision. (Cal. Rules of Court, rule 232(a).)